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No. 444

In the Supreme Court of the United States

OCTOBER TERM, 1945

FLORENCE B. BIDDLOW, MARION B. KOERBER, JOHN E. BLOOM, AND WILLIAM C. BLOOM, PETITIONERS

v.

RKO RADIO PICTURES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This is a suit under Section 7 of the Sherman Act by petitioners, operators of a motion picture theatre in Chicago, to recover damages for the injury to their business resulting from a conspiracy on the part of respondents to refuse to license motion picture films for exhibition in petitioners' theatre until after the films had been shown in competing theatres operated by certain of the respondents. The principal respondents are the five leading distributors of motion picture films and a subsidiary of each of two of the re-

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spondent distributors engaged in operating motion picture theatres in Chicago.[1]

The jury returned a verdict for petitioners, assessing their damages at $120,000, and judgment was entered for three times this amount, as provided by Section 7 of the Sherman Act (R. 2125, 2127). The court below, on appeal, held that there was evidence from which the jury might conclude that the respondents had conspired to maintain an illegal system of releasing films (R. 2270–2271) but that there was no evidence from which the jury could find that petitioners had been injured by this conspiracy (R. 2273–2275). The court accordingly set aside the judgment for petitioners and directed the district court to enter judgment for respondents *non obstante veredicto* (R. 2275).

In a suit between private litigants under Section 7 of the Sherman Act, the Government is not concerned with possible error in rulings involving solely the determination of the particular cause. But the Government, which is charged with the duty of enforcing the Sherman Act, regards the treble damage suits authorized by

[1] One of the respondent exhibitors operates 54 theatres in Chicago and its suburbs and the other operates 23 theatres in that city.

The respondent exhibitor Warner Bros. Management Corporation is a subsidiary of respondent Warner Bros. Pictures, Inc., which is the parent company of the respondent distributor Vitagraph, Inc.

Section 7 as an important supplementary aid in bringing about obedience to the commands of the statute. The Government is therefore concerned when a ruling in a suit under Section 7 is general in its application and would, if followed as a precedent, substantially militate against the effectiveness of the remedy given by that Section. We believe that the holding of the court below that there was no evidence to support a finding that petitioners had been injured by respondents' conspiracy is of this character. This is the only question before the Court which will be dealt with in this *amicus* brief.

In discussing the question of whether there was evidence to support a finding of injury we shall assume, purely *arguendo*, that the court below was correct in holding that the jury's verdict rests on a particular "theory of conspiracy." We understand that the court held that the conspiracy which the jury found was one to restrain and monopolize interstate commerce by maintaining the "Chicago system of release" (R. 2267, 2269, 2272). That system, as described in the court's opinion, provided for agreement by the respondents upon the playing position of all Chicago theatres and agreement that each respondent distributor would enter into a contract for exhibition of its films in any theatre only on the basis of the theatre's playing position as fixed by the conspiracy (R. 2265–2267). The conspiracy also in-

cluded price fixing, in that the respondents agreed upon the minimum admission to be charged by all theatres in a given playing position, and each respondent distributor agreed to include in its licensing contracts the requirements that the theatre charge not less than the agreed-upon admission price in exhibiting the distributor's films (R. 2266).

The court held that since the conspiracy found by the jury consisted of depriving petitioners of the opportunity to deal in a free market in acquiring pictures, the only evidence which would establish that the conspiracy had injured them would be proof that if they had been permitted to bid for pictures "on an open market" their profits would have been higher than were their actual profits (R. 2272). The court further held that no evidence of this kind had been presented to the jury (R. 2272, 2273, 2275).

Under the court's holding, persons who destroy a free market by illegally restraining or monopolizing trade may obtain, by their own wrongdoing, practical immunity from the treble damage suits authorized by Congress. This is so because the illegal conduct makes it impossible to bring forward the only kind of proof of injury which, under such ruling, will support the suit.

The facts in this case illustrate how complete and absolute is the bar to recovery under the court's application of its ruling as to the proof

requisite to show injury. There was evidence before the jury showing the earnings of petitioners' theatre during a four-year period prior to July 28, 1937, and during the five following years, the period covered by petitioners' suit. The average yearly earnings in the earlier period, if they had been maintained in the later period, would have exceeded the actual earnings in that period by more than $120,000 (R. 476, 2269). The court held that the earnings in the prior period could not be taken as proof of the earning capacity of petitioners' theatre in a free market since the Chicago system of release had been in effect in this prior period (R. 2272).

It should be noted that the court below held that the jury's verdict must be taken as establishing that respondents had adopted the practice of showing double features in their theatre "pursuant to and as a part of the conspiracy" (R. 2274). This practice was put into effect at approximately the end of the four-year period and the beginning of the five-year period referred to above (R. 854–855, 1083–1089). Accordingly, during the later period, but not during the earlier one, petitioners suffered such additional injury to their business as was caused by respondents' adoption of the practice of double featuring. The court below, in fact, pointed out that the evidence showed that before respondents instituted the practice of double featuring petitioners' theatre

"was always able to obtain some product * * * free of the restrictions of the Chicago system of release" and that that product was "taken away" from petitioners and was no longer "obtainable by" them when respondents, pursuant to the conspiracy, began the practice of double featuring (R. 2274).

Where, as in this case, a conspiracy is extended so as to embrace within its restraints products which a competitor needs in its business and which it previously had been able to purchase in a free market, evidence that its earnings were higher before this conspiracy was so extended than subsequent thereto would, we should suppose, warrant a jury in concluding that the competitor had been injured by the conspiracy, even under the holding of the court below that petitioners, in order to recover, must put forth some evidence that their theatre could earn more if free from the restraints imposed by respondents' conspiracy than it was able to earn under the restraints imposed upon it by this conspiracy.

The court also excluded from consideration evidence showing that during the period covered by petitioners' suit for damages, the admission receipts of a competitive theatre, the Maryland, were substantially greater than the admission receipts of petitioners' theatre. It was undisputed that this theatre was almost the same size as petitioners' theatre, charged the same admission price, had a preferred playing position under

the conspiracy, and was owned by a respondent. There was also evidence from which a jury could have concluded that petitioners' theatre had a better location than the Maryland and would be able to obtain, in a free market, a better, or at least equal, playing position. (R. 164–165, 243, 1132–1136, 1139–1143.)

We should suppose that the foregoing facts constitute the most cogent kind of evidence that petitioners' receipts in a free market would have approximated those actually obtained by its competitor and that the conspiracy, by depriving petitioners of the opportunity to do so, had injured its business. We fail to understand the ground of the holding (R. 2274) that such evidence does not support a finding of injury.

It should be borne in mind that in this case the leading distributors of motion picture films and two concerns operating the most important motion picture theatres in Chicago had combined together to deprive petitioners' theatre of any opportunity to obtain pictures, so far as the crucial matter of the theatre's playing position was concerned, in a free market. Under the conspiracy, furthermore, competitive theatres, owned by members of the conspiracy, were given a preferred playing position. Upon these facts alone, it seems "fair to say that the natural and probable effect of the combination" would be to injure petitioners' business. Cf. *Story Parchment Co.* v.

Paterson Co., 282 U. S. 555, 561. Where the evidence thus shows that the natural and probable effect of the conspiracy is to injure petitioners' business, we submit that this proof warrants a finding of injury.

While the sufficiency of the evidence to support a finding by the jury that the plaintiff in a suit under Section 7 of the Sherman Act has been injured by the defendants' conspiracy and the sufficiency of the evidence to support the jury's determination of the amount of the plaintiff's injury present different issues, we submit that the considerations which have led this Court to interpret liberally the fact-weighing functions of the jury when it passed upon the latter issue, are also applicable to its determination of the fact of injury.

In *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 563, this Court said:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.

This Court, in dealing with proof of damages in other like situations, has said that "To require proof * * * approaching mathematical certitude would bar a recovery for an actual injury suffered" (*Palmer* v. *Connecticut Ry. Co.*, 311 U. S. 544, 559), and that the test of whether the amount of damage has been sufficiently established is whether "the quantum of proof produced forms an adequate basis for a reasoned judgment" (*idem.*, p. 558). What is required, this Court has said, "is not mathematical exactness but only a reasonable approximation." *Sheldon* v. *Metro-Goldwyn Corp.*, 309 U. S. 390, 408.

We believe that under all the circumstances of the present case, the court below clearly erred in holding that there was no evidence to support a finding by the jury that the petitioners had been injured by the respondents' conspiracy.

Respectfully submitted.

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